(1)

Supreme Court, U.S.
FILED

No. 10-128

JUN 1 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Daniel Ray Unger,

Petitioner

v.

Greg Taylor; John Smith; Bryan Chason; Zak Montoya; Carl Davis; Anderson County, Texas;

Respondents

On Petition For Writ Of Certiorari

To the United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Daniel Ray Unger
General Delivery
Grapeland, Texas 75844
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QUESTIONS PRESENTED FOR REVIEW

1. Are the posterity of the Sovereign American People immune from the jurisdiction of the courts of the United States and the States in accordance with the Foreign Sovereign Immunities Act as codified in 28 U.S.C. § 1330, §§ 1602-1611?

2. Can a person who makes a timely claim of sovereign immunity be lawfully 1) arrested without writ, warrant or authority for a minor traffic offense; 2) incarcerated for two days before being taken immediately before a magistrate for a probable cause determination; 3) re-incarcerated by a magistrate's verbal order, prior to any charges being filed or a probable cause determination being made; 4) incarcerated for two days and two nights without being provided a bed or bedding?

3. Are the sovereign American People required to have a driver's license and proof of insurance in order to lawfully travel in an automobile upon the public highways?

4. Did the trial court judge abuse his discretion and deny Petitioner's right to due process of law and right to a fair trial when the said judge proceeded to hear a case after Petitioner timely filed an unsworn declaration [28 U.S.C. § 1746] alleging bias and prejudice.

LIST OF PARTIES IN COURT BELOW

1. Daniel Ray Unger
2. Sheriff Greg Taylor
3. Deputy John Smith
4. Deputy Bryan Chason
5. Jailor Zak Montoya
6. Justice Carl Davis
7. Anderson County, Texas

Corporate Disclosure Statement:

Not Applicable: There is no publicly owned corporation involved in this cause.

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CITATIONS

The final judgment of the District Court is shown in Appendix A.

The United States Court of Appeals for the Fifth Circuit determined that its opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4. However, the opinion is provided in Appendix B.

STATEMENT OF BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on March 02, 2010. A copy of that decision is appended to this petition in the appendix. Petitioner timely filed and served this Petition for Certiorari on June 1, 2010. Therefore, this Court has jurisdiction of this cause pursuant to 28 U.S.C. § 1254(1), and Art. III. of the Constitution for the United States of America.

CONSTITUTIONAL, Statutes, and etc. Authorities

Articles of Confederation Article IV:

> *The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State,...*

Constitution for the United States of America, Art. IV. Section 2[1]:

> *The Citizens of each State shall be entitled to all Privileges and immunities of Citizens in the several States.*

Amendment IV. Bill of Rights:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches*

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. Bill of Rights:

No person shall be...deprived of life, liberty or property, without due process of law;...

28 U.S.C. § 1332(e):

(e) The word "States" as used in this section includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1603:

For purposes of this Chapter-
(a) A "foreign state", ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity-
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof,... and
(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1604:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

STATEMENT OF THE CASE

This case arises from violation of constitutionally protected rights under color of law and for common law torts which

began when Petitioner was stopped at a routine traffic stop. The basic facts show that Petitioner was entitled to summary judgment as a matter of law and are as follows:

On Friday October 28, 2005, around 10:30 A.M. Petitioner was stopped by Deputy Respondent(s) allegedly for "defective equipment exhaust". Respondent(s) asked Petitioner for his driver's license and proof of liability insurance, and Petitioner replied that he had neither; and also claimed that as the direct posterity of the sovereign American people he had sovereign immunity, was not required to have a driver's license or insurance, and could not be arrested for minor traffic offenses [It is undisputed that Petitioner is the direct posterity of John W. Unger who served as a border ranger and ensign in the American Revolutionary War, and who had taken the Oath of Allegiance to the Commonwealth of Pennsylvania in 1776]. Respondent(s) arrested Petitioner, who then demanded to be taken to the precinct judge [Justice of the Peace Linda Ray, whose court was open during normal business hours] located a few blocks from

the stop. Instead Petitioner was jailed by Respondent(s) without writ, warrant or authority and before being taken before a magistrate for a probable cause determination or a determination of sovereign immunity. The Justice of the Peace Linda Ray, having jurisdiction in this precinct was only a few blocks from the stop location and her office/court was open during normal business hours.

While incarcerated, Respondent(s) denied Petitioner use of the phone, legal papers delivered by his wife, contact with his family, bed and bedding, and was denied access to the courts as punishment as a pretrial detainee. Bedding which Petitioner acquired from another inmate [who was being transferred to another facility] was taken from him by Respondent(s). Petitioner was also held in the holding tank [designed as a temporary holding facility] for the duration of his incarceration, which was two days and two nights.

Petitioner was taken before a Respondent Justice of the Peace Carl Davis, who had no personal or territorial jurisdiction over Petitioner, on Saturday October 29, 2005 at approximately 1:47 p.m. A purported hearing was held at the jail, a

hearing which was not open to the public. The purpose of the hearing was to illicit a plea of not guilty or guilty from Petitioner. Respondent magistrate claimed Petitioner was charged with no driver's license, no insurance, and defective equipment exhaust, but these alleged charges were based only upon internal jail paperwork, as no sworn complaints had been filed with any court as required by law. Respondent magistrate asked Petitioner to enter a plea of not guilty or guilty based upon the information reflected upon the internal jail documents. However, instead Petitioner made a claim of sovereign immunity. Furthermore, internal jail documents show Respondent magistrate made no determination of probable cause; and furthermore, no witnesses were called to testify against Petitioner. It is undisputed that Petitioner made a claim of sovereign immunity pursuant to the Foreign Sovereign Immunities Act 28 U.S.C. § 1604, and said claim was disregarded by Respondent magistrate. After Respondent magistrate disregarded Petitioner's claim of sovereign immunity, Petitioner requested pencil and paper to make a written claim of immunity, but Respondent magistrate

refused this request. Despite the fact that no charges had been filed with any court, that no probable cause determination had been made by the Respondent magistrate, and Petitioner's claim of sovereign immunity, Respondent magistrate remanded Petitioner to incarceration pending the posting of $1500.00 bale/bond. Petitioner eventually posted $1500.00 bond, which was later returned, and Petitioner was released pursuant to Writ of Habeas Corpus. Petitioner was never prosecuted, nor were any charges filed against, Petitioner.

On October 27, 2006 Petitioner instituted this action in the United States District Court for common law torts as this action was brought as a diversity claim pursuant to 28 U.S.C. § 1332(a)(4) and Art. III.; and for violations of rights under color of law pursuant to 42 U.S.C. § 1983.

During the trial Petitioner was denied his right to due process of law and a fair trial by the trial court on a continual basis. The trial court denied Petitioner's motion for summary judgment which should have been granted as a matter of law; and the trial court partially granted Respondent(s)' motion for summary judgment. The trial

court gave no consideration to Petitioner's claim of sovereign immunity and Petitioner's claimed right to travel upon the public highways as a matter of right. On June 10, 2008, Petitioner timely filed an unsworn declaration [28 U.S.C. § 1746] pursuant to 28 U.S.C. §§ 144 and 455(a) alleging bias and prejudice on the part of the trial court. On June 11, 2008, the trial court issued an order denying Petitioner's declaration of bias and prejudice without setting the matter for hearing. In the order the trial court addresses two of the seven instances of bias and prejudice by essentially whitewashing over the issues and stating the court had rectified the complained of incidences. The trial court then determined that Petitioner's remaining complaints were either not accurate or not meritorious without explanation.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed on March 2, 2010, but misstated many of the facts and issues brought before it, while ignoring others. The Fifth Circuit, although briefly referring to Petitioner's claim to sovereign immunity, did not address this point.

The Fifth Circuit also determined that, after trial on the merits, Petitioner's motion for summary judgment becomes moot. However, the Fifth Circuit failed to address the issue presented concerning Petitioner's right to have summary judgment granted as a matter of law.

The Fifth Circuit also failed to determine if Petitioner had a right to travel upon the public highway as a matter of right without having to have a driver's license or proof of insurance. Although the Fifth Circuit addressed the issue concerning the right to travel indirectly, it never confronted the driver's license or insurance issue requirement.

The Fifth Circuit further erroneously found that the district court did not abuse its discretion in denying Petitioner's declaration of bias or prejudice.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Eastern District of Texas had undisputed jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1332(a)(4),

1343(a)(3), 1603(a), 42 U.S.C. 1983, and Art. III. of the Constitution for the United States of America.

The District Court's decision was duly appealed. District Court entered final judgment on July 23, 2008, but it was not mailed until July 24, 2008. Petitioner filed his original notice of appeal on July 24, 2008, prior to having received the District Court's 'final judgment'. Petitioner later filed an amended notice of appeal on July 31, 2008, which included the final judgment as an issue for appeal.

The United States Court of Appeals for the Fifth Circuit had jurisdiction to review the decision of the United States District Court for the Eastern District of Texas pursuant to 28 U.S.C. § 1291.

ARGUMENT FOR ALLOWANCE OF WRIT

The decision below should be reviewed because it presents an issue [concerning sovereign immunity] for the first time and which the Fifth Circuit neglected to address, and in doing so, the Fifth Circuit has effectively negated Petitioner's claim

and right of sovereign immunity pursuant to the Foreign Sovereign Immunities Act as codified in 28 U.S.C. §§ 1602-1611. The Fifth Circuit's failure to properly address and extend sovereign immunity to Petitioner, has disrupted the orderly administration of Petitioner's claim for sovereign immunity; and in doing so has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

The decision below should be reviewed because the Fifth Circuit's decision infringes upon a basic constitutional right, the right to liberty, by requiring Petitioner to obtain a license and insurance prior to exercising his right to travel while using an automobile as a means of conveyance. This decision by the Fifth Circuit is in conflict with two decisions made by this Court in **Williams v. Fears**, 179 U.S.270 at 274 which states in pertinent part:

> *Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the*

> *right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.*

And in **Packard v. Banton**, 264 U.S. 140 at 145 which states in pertinent part:

> *Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former.*

The Fifth Circuit has entered a decision in conflict with this Court, one which infringes upon one of the most protected basic rights of personal liberty, an important matter so as to call for the exercise of this Court's supervisory power to correct this infringement.

The Fifth Circuit has failed to address Petitioner's issue concerning that his motion for summary judgment should have been granted as a matter of law. This decision by the Fifth Circuit is in conflict with the decision made in ***Schaefer v. State Ins. Fund***, 207 F.3d 139, 142 stating:

> "*although normally 'where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed,* ***this rule does not apply where the district court's error was purely one of law.***" [emphasis added]

The Fifth Circuit has entered a decision in conflict with the decision of the Second Circuit on the same important matter so as to call for an exercise of the Court's supervisory power to determine this important issue.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: 7/21/2010

Respectfully submitted,

Daniel Ray Unger

Supreme Court, U.S.
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No. 10-128

In The

Supreme Court of the United States

Daniel Ray Unger,

Petitioner

v.

Greg Taylor; John Smith; Bryan Chason; Zak Montoya; Carl Davis; Anderson County, Texas;

Respondents

On Petition For Writ Of Certiorari

To the United States Court Of Appeals
For The Fifth Circuit

APPENDIX VOL. 1

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APPENDIX TABLE OF CONTENT

Appendix A:
Final Judgment of the District Court. Pages 1-4

Appendix B:
Opinion issued by the Fifth Circuit Court of Appeals Pages 1-28

For the Eastern District of Texas
Tyler Division
(Jury Action)

Daniel Ray Unger, Plaintiff	**§**	
General Delivery	**§**	
United States Post Office	**§**	
Grapeland, Texas 75844	**§**	
	§	**Civil Action No.**
	§	**6:06cv466**
V.	**§**	**Complaint**
	§	
Greg Taylor, John Smith and	**§**	
Zak Montoya	**§**	

JUDGMENT

On this the 24TH day of June, 2008, at a regular term of this Court, came on to be heard the above entitled and numbered cause wherein **Daniel Ray Unger,** Plaintiff, and Greg Taylor, John Smith and

Zak Montoya are Defendants; and the Plaintiff appeared in person and through his duly appointed Standby Attorney, David Iglesias, and the Defendants appeared by and through their attorneys of record; whereupon, the jury proceeded to hear the evidence. At the conclusion of Plaintiffs case in chief, the court granted a directed verdict for Sheriff Greg Taylor. The jury, after having heard all the evidence were presented with the Jury Verdict Form and returned the verdict as follows:

Do you find by a preponderance of the evidence that Defendant Deputy John Smith deprived Plaintiff, Daniel Unger of a constitutionally guaranteed right by

performing a traffic stop without reasonable suspicion?

Answered "No."

Do you find by a preponderance of the evidence that Zak Montoya deprived Plaintiff Daniel Unger of a constitutionally guaranteed right by not providing otherwise available bedding to Daniel Unger during his confinement?

Answered "No.

Do you find by a preponderance of the evidence that Defendant Zak Montoya, as a form of punishment, deprived Plaintiff Daniel Unger of a constitutionally guaranteed right by taking away bedding that Plaintiff Daniel Unger acquired from another inmate?

Answered "No."

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the verdict reached was unanimous by all jurors and the Court accepted the verdict.

It is further ORDERED that Plaintiff take nothing by reason of the

jury verdict.

It is further ORDERED by the Court that all costs of court shall be and the same are hereby adjudged against the Plaintiff; and any relief prayed for and not herein specifically granted shall be and the same is hereby in all things denied.

s/_____

MICHAEL H. SCHNIEDER

UNITED STATE DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED
March 2, 2010
Charles R. Fulbruge III, Clerk

Nos. 08-40755 & 08-40945

DANIEL RAY UNGER,

Plaintiff-Appellant,

v.

SHERIFF GREG TAYLOR; DEPUTY SHERIFF JOHN SMITH; DEPUTY SHERIFF BRYAN CHASON; JAILOR ZAK MONTOYA; JUSTICE OF THE PEACE CARL DAVIS; ANDERSON COUNTY, TEXAS,

Defendants–Appellees,

Appeals from the United States District Court

for the Eastern District of Texas

USDC No. 6:06-CV-466

Before GARZA,
CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

Daniel Ray Unger appeals the district court's judgment on his claims under 42 U.S.C. § 1983. We affirm.

I

In 2005, as Unger was driving through Anderson County, Texas, with an out-of-state license plate, he was pulled over by Deputy Sheriff John Smith, purportedly for defective exhaust equipment. Deputy Smith asked Unger for his driver's license and proof of liability insurance, and Unger replied that he had neither. Deputy Smith then asked Unger for his name and date of birth. Unger gave the deputy his name and explained that he did not use a birthday since, as an identifying

number, it could be used to obtain a social security number, which would violate his deeply held religious belief of not being numbered. He also claimed that he could not be arrested since, as the "direct posterity of the American people," he had sovereign immunity.

Deputy Sheriff Bryan Chason arrived at the scene shortly after Deputy Smith. Deputy Smith frisked and handcuffed Unger, and Deputy Chason then transported Unger to the Anderson County Jail. Unger was booked on charges of operating a vehicle without liability insurance, operating a vehicle without a valid driver's license, and operating a motor vehicle with defective equipment. The following afternoon he was arraigned before Justice of the Peace Carl Davis. Unger refused to enter a plea. He was released the same day after posting $1,500 in bail.

Unger subsequently filed a petition for writ of habeas corpus against Sheriff Greg Taylor and

Justice Davis in the County Court of Anderson County, Texas. In a hearing on the petition, the court discovered that the charges against Unger were erroneously filed in the 2nd Precinct of Anderson County, rather than the 1st Precinct, where the alleged traffic offenses occurred. Because under Texas law misdemeanor cases are to be tried in the precinct in which the offenses occurred, the court ruled that Justice Davis did not have[1] proper venue and dismissed the charges against Unger. Unger's bail was then returned to him.

Unger, proceeding pro se, sued Sheriff Taylor, Deputy Smith, Deputy Chason, Jailor Zak Montoya, Justice Davis, and Anderson County, Texas, alleging numerous constitutional violations. He also brought state law claims of intentional infliction of emotional distress, false imprisonment, and malicious prosecution. Both Unger

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[1] *See* TEX. CODE CRIM. PROC. ANN. art. 4.12(a)(1).

and the defendants moved for summary judgment. The district court granted summary judgment in favor of the defendants based on qualified immunity for Unger's Fourth Amendment claim in connection with his arrest and subsequent detention, his Fourth Amendment claim in connection with the search of his person and the car, his Eighth Amendment claims related to the continuous illumination in the jail and the jail's unsanitary conditions, his First and Eighth Amendment claim that he was denied a diet in accordance with Biblical dietary laws, his Eighth Amendment claims that he was tortured, deprived of a blanket, and not allowed to make telephone calls, his claim that he was denied his constitutional right of access to the courts, his Fourth Amendment claim that he was not brought promptly before a magistrate, his Sixth Amendment claim for denial of access to an attorney, and his claim for violation of the right to travel. The court ruled that the defendants

were not shielded by qualified immunity on Unger's Fourth Amendment claim against Deputy Smith for the initial traffic stop and his Eighth Amendment claim that he was denied bedding. The court further ruled that Justice Davis was entitled to judicial immunity as to all of Unger's claims against him, that Unger had failed to state a claim of municipal liability against Anderson County, and that the defendants were entitled to summary judgment on all of Unger's state law claims. The court denied Unger's motion for summary judgment in its entirety.

Unger subsequently moved to amend his complaint, and the court denied the motion. His two remaining claims proceeded to trial, and the jury ruled in favor of the defendants on both claims.

Unger now presents five issues on appeal. First, he asserts that the district court abused its discretion when it denied his motion to amend his complaint.

Second, he claims that the district court erred in denying his motion for summary judgment. Third, he contends that the district court erred in partially granting the defendants' motion for summary judgment. Fourth, he avers that the district court abused its discretion in denying his motion to compel. And finally, he argues that the district court abused its discretion when it proceeded to hear the case after Unger filed an affidavit alleging judicial bias.

II

We review the district court's denial of a motion to amend the complaint for abuse of discretion. Federal Rule of Civil Procedure 15(a)(2) provides that[2] leave to amend the complaint should be given "freely . . . when justice so requires." But because Unger filed his motion to amend the complaint nearly[3] eleven months after the

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[2] *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 208 (5th Cir. 2009).

[3] FED. R. CIV. P. 15(a)(2).

deadline for amendments in the scheduling order, his motion to amend is governed by Rule 16(b). Under Rule 16(b), a scheduling[4] order may be modified only "for good cause." We consider four factors in[5] determining good cause: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice."[6]

Unger argued that the district court should allow amendment since he was pro se and had "inartfully pled" his claims. As reasons for the denial of Unger's motion, the district court cited the tardiness of the motion, the imminence of trial, and the defendants' failure to consent to the amendment.

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[4] *See Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 348 (5th Cir. 2008).

[5] F ED. R. CIV. P. 16(b)(4).

[6] *Sw. Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 546 (5th Cir. 2003) (internal quotation marks omitted).

Under these circumstances, and considering Unger's failure to explain the untimeliness of his motion, the district court acted within its discretion in denying Unger leave to amend.

III

Unger next contends that the district court erred in denying his motion for summary judgment. But "an interlocutory order denying summary judgment is not to be reviewed where final judgment adverse to the movant is rendered on the basis of a subsequent full trial on the merits." Once trial begins, "the summary judgment motion effectively becomes[7] moot." Because Unger[8] received an adverse final judgment after a jury trial on the merits of his case, we will not consider his appeal from the denial of his motion for summary judgment.

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[7] *Black v. J.I. Case Co., Inc.*, 22 F.3d 568, 570 (5th Cir. 1994); *see also Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 n.4 (5th Cir. 2009) (noting that we normally decline to review a district court's denial of summary judgment after full trial on the merits).

[8] *Black*, 22 F.3d at 571.

IV

Unger also appeals from the district court's grant of partial summary judgment in favor of the defendants. We review the grant of a motion for summary judgment de novo, applying the same standard as the district court.[9] Summary judgment is appropriate when the competent summary judgment evidence demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[10]

Unger challenges seven of the rulings in the district court's order granting partial summary judgment. He challenges the district court's grant of summary judgment based on qualified immunity for (1) his Fourth Amendment claim in connection with his arrest and subsequent detention, (2) his Fourth Amendment claim in connection with

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[9] Threadgill v. Prudential Sec. Group, Inc., 145 F.3d 286, 292 (5th Cir. 1998).

[10] *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008).

the search of his car and his person, (3) his Fourth Amendment claim for failure to bring him promptly before a magistrate, (4) his claim for violation of the right to travel, and (5) his claims related to his punishment as a pretrial detainee. Unger also challenges: (6) the district court's ruling that Justice Davis was entitled to judicial immunity and (7) its dismissal of his claims for municipal liability against Anderson County.

A

Qualified immunity protects government employees against civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The[11] Supreme Court has articulated a two-prong inquiry into resolving government officials' qualified immunity claims. Under the first prong, the court must[12] decide whether the facts the plaintiff has

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[11] *Wernecke v. Garcia*, 591 F.3d 386, 392 (5th Cir. 2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted).
[12] *Id.*

shown make out a violation of a constitutional right. The second prong requires the court to consider "whether[13] the right at issue was 'clearly established' at the time of defendant's alleged misconduct." The court may consider these prongs in any sequence.[14] [15] As to the second inquiry, a right is "clearly established" when "the contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right." The focus is on[16] "fair warning" and whether the official would be "on notice" that his actions violated constitutional rights.[17]

1

Unger first contends that the district court erred in granting summary

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[13] *Pearson v. Callahan*, 129 S. Ct. 808, 815-16 (2009).

[14] *Id.* at 816.

[15] *Id.* at 818.

[16] *Wernecke*, 591 F.3d at 392 (internal quotation marks and citation omitted).

[17] *Id.* at 393.

judgment on his claim that Deputy Smith and Deputy Chason violated his Fourth Amendment rights by unlawfully arresting and detaining him. The district court ruled that the officers were entitled to qualified immunity since Unger had failed to show that they had violated a constitutional right.

To succeed on a constitutional claim for unlawful arrest, the plaintiff must show that the arrest was not supported by probable cause. "Probable cause[18] exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense."[19]

Deputy Smith asserts that he had probable cause to arrest Unger on three grounds: (1) driving without a license in violation of Texas Transportation Code §

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[18] *See Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009).

[19] *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004) (quoting *United States v. Levine*, 80 F.3d 129, 132 (5th Cir. 1996)) (internal quotation marks omitted).

521.021, (2) driving without liability insurance in violation of § 601.051, and (3) operating a vehicle with defective equipment in violation of § 547.605. It is undisputed that Deputy Smith asked Unger for his license and proof of insurance and that Unger responded that he had neither. At that point,[20] Deputy Smith had probable cause to arrest Unger for violation of § 521.021 and § 547.605. Accordingly, Unger has not shown that there are triable factual[21] issues as to whether the arrest violated his constitutional rights. The district court correctly granted summary judgment on this claim.

2

Unger next argues that the

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[20] A law enforcement officer may request the driver's license and vehicle registration in connection with a traffic stop. *See United States v. Brigham*, 382 F.3d 500, 507-08 (5th Cir. 2004).

[21] *See Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001) (holding that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

district court erred in granting summary judgment based on qualified immunity on his claim that Deputy Smith and Deputy Chason unlawfully searched his car and his person. Unger contends that the searches were unlawful since they were not incident to a lawful arrest. He does not contest the scope of the searches.

Law enforcement officers "may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence." Such warrantless searches may be performed in connection with[22] any arrest based on probable cause. Here, after Unger's arrest, Deputy Smith[23] and Deputy Chason performed a limited search of Unger's car, as well as his person and wallet, in an effort to find proof of insurance and vehicle registration. Because the arrest at issue was based on probable cause and thus lawful, the subsequent searches of Unger's car and person were also lawful. As such, the district court correctly granted

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[22] *Virginia v. Moore*, 128 S. Ct. 1598, 1607 (2008).
[23] *Id.*

summary judgment on this claim.

3

Unger next asserts that the district court erred in ruling that the officers were entitled to qualified immunity in connection with his claim that they violated his Fourth Amendment rights by failing to take him promptly before a magistrate.

The Supreme Court has held that persons arrested without a warrant "must promptly be brought before a neutral magistrate for a judicial determination of probable cause." The Court has further explained that[24] determinations of probable cause within 48 hours of arrest will generally be considered prompt. Still, a probable cause determination within 48 hours may[25] not pass constitutional muster if the arrested person can show that the determination was "delayed unreasonably." Examples of

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[24] *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991) (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)).

[25] *Id.* at 56.

unreasonable delay[26] might include "delay incurred for the purpose of gathering additional evidence to justify the arrest, delay motivated by ill will against the arrested individual, or delay for delay's sake."[27] Here, it is undisputed that Unger was arrested on October 27, 2005, booked into the jail at 11:23 a.m. that same day, and taken before Justice Davis for arraignment the following day at 1:47 p.m. Thus Unger's appearance before the magistrate occurred within the 48-hour time frame required by *McLaughlin*. However, the probable cause determination could still be unconstitutional if it was "delayed unreasonably." Defendants provided evidence that on October 28, 2005, Justice Davis completed his arraignments prior to the booking of Unger and held no other arraignments until the following day. Unger did not refute this evidence. Nor did he provide any evidence of unreasonable delay. Accordingly, Unger has not shown that

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[26] *Id.*

[27] *White v. Taylor*, 959 F.2d 539, 546 (5th Cir. 1992).

there are issues of material fact concerning whether the less than 48- hour delay violated his constitutional rights.

4

Unger next argues that the district court erred in dismissing his claim for violation of his constitutional right to travel. Although there is a fundamental right to travel, the Supreme Court has recognized that there are "situations in which a State may prevent a citizen from leaving," such as when "a person has been convicted of a crime within a State." The Court has further explained[28] that "even before trial or conviction, probable cause may justify an arrest and subsequent temporary detention" such that the person is "temporarily deprived of his freedom to travel elsewhere within or without the State." Here, as[29] discussed *supra*, Deputy Smith had probable cause to arrest Unger for driving without a license or liability insurance. Accordingly, Unger's brief detention did not violate his

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[28] *Jones v. Helms*, 452 U.S. 412, 419 (1981).
[29] *Id.*

right to travel, and the district court properly granted summary judgment on this claim.

Unger's brief also states that "the gravamen of his claim of punishment as a pretrial detainee is as follows" and then lists five problems he had with his pretrial detention, including his placement in a holding tank, his lack of access to a phone, his lack of access to pencil and paper, his lack of bedding, and his lack of visitation. His brief does not present any arguments with regard to these issues and does not address the district court's reasons for dismissing his claims. Although pro se briefs are liberally construed, "such litigants must still brief contentions in order to preserve them." Claims not adequately argued in a[30] brief are deemed abandoned on appeal. Accordingly, Unger has waived these[31] issues.

B

Unger also challenges the district

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[30] *Longoria v. Dretke*, 507 F.3d 898, 901 (5th Cir. 2007).
[31] *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

court's summary judgment ruling that Justice Davis is entitled to judicial immunity. Unger contends that Justice Davis "falsely acted in the capacity of a judicial officer in a case in which he was wholly lacking in jurisdiction."

A judge generally has absolute immunity from suits for damages. This immunity extends to justices of the peace. Judges do not, however,[32] have[33] immunity for "actions not taken in the judge's judicial capacity" or for "actions, though judicial in nature, taken in the complete absence of all jurisdiction." In[34] considering whether a judge's action was in the complete absence of jurisdiction, "the scope of the judge's jurisdiction must be construed broadly." A judge will[35] not be deprived of immunity merely because his action "was in error, was done maliciously, or

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[32] *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 221 (5th Cir. 2009) (citing *Mireles v. Waco*, 502 U.S. 9, 9-10 (1991)), *cert. denied*, 130 S. Ct. 624 (2009).

[33] *Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982).

[34] *Mireles*, 502 U.S. at 11-12.

[35] *Stump v. Sparkman*, 435 U.S. 349, 356 (1978).

was in excess of his authority."[36]

Unger's contention that Davis's actions in arraigning him were "wholly lacking in jurisdiction" has no merit. All of the actions of which Unger complains—denying him the right to make a phone call in court, failing to make a finding of probable cause, denying his request for paper and pencil in court, and asking him to enter a plea to the charges—are judicial in nature. And while Justice Davis's actions may have been in error since Unger was taken to the wrong precinct, that does not render them performed "in the complete absence of jurisdiction." The district court correctly ruled that Justice Davis was[37] entitled to absolute immunity.

C

Unger's next challenge to the district court's summary judgment ruling concerns its dismissal of his claim against Anderson County. Unger contends that Anderson County intentionally violated his right to due

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[36] *Id.*

[37] *See id.*

process of law, right of access to courts, right to counsel, right not to be punished as a pre-trial detainee, and right to liberty.

A local government entity may be sued "if it is alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" To establish[38] municipal liability under § 1983, the plaintiff must show that "(1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right."[39]

Unger has not shown that there are issues of material fact as to whether Anderson County had an official policy resulting in constitutional torts. The official policy requirement can be met in at least three different ways: (1) when an

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[38] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 680 (1978)).

[39] *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009), *pet. for cert. filed*, No. 09-983 (Feb. 16, 2010).

"officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of the policy"; (2) when there is no official policy announced, "but the action of the policymaker itself violated a constitutional right"; or (3) when the policymaker fails to act affirmatively when the need to take action "is so obvious" that the policymaker's inaction renders it "deliberately indifferent to the need." Unger's convoluted[40] allegations appear to allege that Anderson County had policies or customs of incarcerating individuals "without authority of sworn complaints," punishing pre-trial detainees for their religious beliefs, and violating the constitutional rights of pre-trial detainees. But Unger has provided no competent summary judgment evidence to support his assertion that Anderson County had such a policy. His only piece of evidence—a statement in his affidavit that he spoke with a man

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[40] *Burge v. Parish of St. Tammany*, 187 F.3d 452, 471 (5th Cir. 1999).

named Howard Gambrell who was also "denied his rights as punishment for the exercise of his religious beliefs, placed in the holding tank of the Anderson County jail, and denied the right to use the phone to call counsel"—is not based on personal knowledge, and thus is not competent summary judgment evidence.[41]

Accordingly, Unger has not shown that there are triable issues of fact on the issue of municipal liability.

V

In addition to his specific challenges to the district court's summary judgment ruling, Unger argues that the ruling was improper since the defendants' summary judgment motion and reply should have been struck for noncompliance with the local rules. Specifically, Unger asserts that the defendants' motion for summary judgment failed to include a statement of undisputed material facts and failed to include appropriate citations to proper summary judgment

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[41] *See* FED. R. CIV. P. 56(c)(1).

evidence as required by Local Rule CV-56. Unger further argues that the magistrate judge should not have given consideration to the defendants' reply brief since it exceeded the page limitation in Local Rule CV-7 and was untimely. We review a district court's enforcement of the local rules for abuse of discretion. Here, the district court was within its discretion in refusing to[42] strike the defendants' summary judgment motion and reply brief. Contrary to Unger's allegations, the summary judgment motion contained a section of undisputed material facts and citations to the defendants' summary judgment evidence. And while the reply brief did exceed the page limitation, Local Rule CV-7(l) gives the district court discretion to allow motions in excess of the page limitation. Similarly, Local Rule CV-7(e) gives the court discretion to allow reply briefs beyond the typical five-day deadline. Under these circumstances, we find no abuse of discretion in the district court's refusal to strike the reply brief.

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[42] *United States v. Rios-Espinoza*, 591 F.3d 758, 760 (5th Cir. 2009).

VI

Unger next argues that the district court abused its discretion in denying his motion to compel production of certain personnel files. In his motion, Unger complained that the 1,000-page personnel file already produced by the defendants was illegible in parts. Defendants responded that the plaintiff could come by the sheriff's office to review the file personally.

We review the district court's denial of a motion to compel for abuse of discretion. A trial court's decision pertaining to discovery should be reversed[43] "only in an unusual and exceptional case." Here, the district court acted within[44] its discretion in denying the motion to compel since the defendants had already produced the personnel file and had also given Unger the opportunity to review the file in person.

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[43] *Burns v. Exxon Corp.*, 158 F.3d 336, 342 (5th Cir. 1998).

[44] *O'Malley v. U.S. Fid. & Guar. Co.*, 776 F.2d 494, 499 (5th Cir. 1985) (internal quotation marks omitted).

VII

Lastly, Unger contests the district court judge's refusal to recuse himself after Unger filed an affidavit alleging bias and moving for the judge's recusal under 28 U.S.C. § 144 and § 455. We review the denial of a motion to recuse for abuse of discretion. Section 144 relates to charges of "actual bias." To[45] [46] proceed under § 144, the movant must present an affidavit that meets the following requirements: "(1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature." Under § 455, a judge must recuse[47] himself "in any proceeding in which his impartiality might reasonably be questioned." The standard is "whether a reasonable

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[45] *Matassarin v. Lynch*, 174 F.3d 549, 571 (5th Cir. 1999).

[46] *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1296 (5th Cir. 1990).

[47] *Id.*

person, with full[48] knowledge of all of the circumstances, would harbor doubts about the judge's impartiality."[49]

Unger's affidavit essentially alleges that the district court judge was biased because of his unfavorable rulings on Unger's numerous nonmeritorious motions, objections, and complaints. Because the alleged bias is "judicial," rather than "personal" in nature, the facts alleged do not meet the requirements for a § 144 affidavit. Neither do the allegations show that a reasonable person[50] would doubt the district court judge's impartiality. As such, the district court did not abuse its discretion in denying Unger's motion.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[48] 28 U.S.C. § 455(a).

[49] *Matassarin*, 174 F.3d at 571.

[50] *See Davis v. Bd. of Sch. Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975) (explaining that the alleged bias was not extra-judicial, but "very much judicial," since the movants were complaining of language in an order and an opinion).

Supreme Court, U.S.
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(2)

No. 10-128

IN THE

Supreme Court of the United States

DANIEL RAY UNGER,

Petitioner

v.

GREG TAYLOR, JOHN SMITH, BRYAN CHASON, ZAK MONTOYA, CARL DAVIS, and ANDERSON COUNTY, TEXAS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court ruling granting judgment in favor of the Respondents as to Petitioner's right to travel claim does not conflict with a decision of this Court or a Court of Appeals, and where the Petitioner does not claim that the Fifth Circuit ruling implicates an important federal question that has not been settled by this Court.

II. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court's judgment in favor of the Respondents and rejecting Petitioner's claim sovereign immunity by birthright does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner fails to demonstrate that the Fifth Circuit's ruling implicates an important federal question that has not been settled by this Court.

III. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court judge's refusal to recuse himself does not conflict with a decision of this Court or a Court of Appeals, and where the Petitioner does not claim that the Fifth Circuit ruling implicates an important federal question that has not been settled by this Court.

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INTRODUCTION

Petitioner has presented no "compelling reasons" for his Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Fifth Circuit's March 2, 2010 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Fifth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, the Petitioner brings forth issues concerning the basic constitutional right to travel, an assertion of sovereign immunity, and an issue of recusal, all of which are either well settled issues of law, non-compelling (un-important issues) and/or concern unrecognized causes of action. Therefore, the petition for writ should be denied.

At a glance, the issues presented before the Court appear unaddressed, original and potentially compelling. Petitioner's central contention is that he, by lineage or birthright, is a member of the "posterity of the Sovereign American People" and, therefore, is immune from the jurisdiction of the courts of the United States and the States in accordance with the Foreign Sovereign Immunities Act as codified under 28 U.S.C. §§ 1602 -1611. Petitioner's claim of sovereign immunity is outrageous and misguided. Notwithstanding the fact that the Petitioner has failed to identify the "Sovereign American People" and failed to provide any evidence of his affiliation with the "Sovereign American People" or how such membership entitles Unger to immunity, the plain language of Section 1602 outlines the "[f]indings and declaration of purpose" of the Act. 28 U.S.C. § 1602.

There should be no question that Sections 1602 through 1611 apply only to a "foreign state" or an "agency or instrumentality of a foreign state." *Id.* Clearly, Petitioner, an American citizen and Texas resident, does not fall within the class of persons or entities who are granted immunity under 28 U.S.C. §§ 1602 -1611.

Further, Petitioner's claim that the Fifth Circuit neglected to address his claim of sovereign immunity, is nothing more than an attempt to distract this Court from the actual claims and legal issues in question that were correctly decided by the District Court and affirmed by the Fifth Circuit. Petitioner's assertions of sovereign immunity and violation of his right to travel are not independent causes of action but, instead, appear to be assertions of a defense as to the criminal violations for which the Petitioner was arrested and charged. Instead of addressing issues pertaining to the *real issues* before the court, such as the reasonableness of the actions of the Respondents, Petitioner's writ attempts to misdirect the Court to legal matters and constitutional disputes that bear no relevance to the legal actions brought against any Respondents herein. The real issues before the Court are whether the Respondents should be held liable for a violation of Petitioner's civil rights rather than whether the Petitioner should be found guilty of the criminal offenses of which he was charged.

Finally, Petitioner relies upon two entirely contradictory arguments. First, is the contention that his civil liberties, derivative of the Federal Constitution (Federal law), were violated by Respondents. Second,

he insists that the federal and state laws are not applicable to (or may not be enforced against) him as a result of being a member, by birthright, of the Sovereign American People. Petitioner would have this Court rule that he is entitled to the protections of the laws of the United States and the State of Texas via the Federal Constitution but not subject (or restricted) by the very same federal and state laws. Clearly, this line of thinking does not follow the constitutional framework of our founding fathers and is outrageous in all respects.

Simply put, Petitioner has failed to carry the burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Therefore, the Petition should be denied.

STATEMENT OF THE CASE

This case was brought by pro se Petitioner Daniel Unger (hereinafter "Unger") and arises from a traffic stop, arrest and detention which occurred on or about October 28, 2005, in Elkhart, Anderson County, Texas.

Unger's Complaint consisted of 16 pages of various complaints and claims for damages. (ROA at p. 26-43).[1] Although Unger denies that he is a citizen of the United States of America or the State of Texas, and further denies that he is subject to the jurisdiction of the State of Texas, he nonetheless attempts to state causes of action under 42 U.S.C. §1983 and alternative state law remedies. (ROA at p. 28-29).

1. Respondents will cite to the Record on Appeal by page number, e.g., (ROA at p. ___).

Among his many constitutional claims, Unger has alleged that the actions and/or inactions of the various Respondents constituted violations of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights; as well as his right to travel and right to liberty. (ROA at p. 26-43). These are all constitutional rights, and Unger alleged violations at virtually every step of the state action.

Unger's case can be simplified by characterizing his complaints against Respondent Sheriff Greg Taylor, Deputy John Smith, Deputy Bryan Chason, and Jailor Zak Montoya into four different phases as follows: 1) Fourth Amendment- Traffic Stop; 2) Fourth Amendment- Detention and Custodial Arrest After Initial Stop; 3) Eighth and Fourteenth Amendments- Conditions of Confinement / Punishment; and 4) Other- including alleged failure to bring Unger immediately before a magistrate and violation of right to travel. Unger's complaint further alleges claims against Respondent, Justice of the Peace Davis as well as against Anderson County.

Respondents moved for summary judgment on all claims based upon qualified immunity, judicial immunity, sovereign immunity and traditional summary judgment standards. (ROA at p. 110). The Court found that Respondents Taylor, Smith, Chason and Montoya were shielded by qualified immunity against all of Unger's claims save two: Unger's claims against Deputy Smith for initiating the traffic stop, and the general denial of bedding against Respondents Sherriff Taylor and Jailor Montoya. (ROA at p. 1111-1127).

The Court further found that Respondent Justice of the Peace Davis was shielded by judicial immunity. (ROA at p. 1111-1127). In addition, the Court granted summary judgment for Anderson County, Texas holding that Unger's state law claims against Anderson County all failed as a matter of law. (ROA at Pg. 1111-1127).

Unger's case proceeded to a trial by jury concerning the above remaining claims. At the conclusion of Unger's case in chief, the court granted a directed verdict for Sheriff Greg Taylor. (ROA at p. 2157-2158; RE at p. 53). The jury, after having heard all the evidence, found in favor of the Respondents. (ROA at p. 233).

STATEMENT OF THE FACTS

On October 28, 2005, Deputy Sheriff John Smith, of the Anderson County Sheriff's Department, was on a routine patrol within the city limits of Elkhart, Anderson County, Texas when he observed a motor vehicle traveling with license plates from the State of Washington. The vehicle's exhaust equipment was excessively loud and Deputy Smith pulled the vehicle over for defective equipment. (ROA at p. 1169-1172).

Deputy Smith asked the driver of the vehicle for his driver's license and proof of liability insurance. The driver responded that he did not have a driver's license or liability insurance. (ROA at p. 1169-1172).

Deputy Smith then asked the driver for his name. The driver stated that his name was Daniel Unger. (ROA at p. 1169-1172).

Deputy Smith asked Daniel Unger for his date of birth. Mr. Unger answered by stating that he was born in 1952 but that he did not use a specific birth day because it was used as a number and could be used to obtain a social security number which would be a violation of Mr. Unger's deeply held religious beliefs of not being numbered. Mr. Unger's deeply held religious belief of not being numbered was also the reason cited for not having a driver's license. (ROA at p. 1169-1172).

Mr. Unger informed Deputy Smith that he was not the owner of the automobile and that the owner's domicile was in the State of Washington. (ROA at p. 1169-1172). Deputy Chason arrived at the scene shortly after Deputy Smith. (ROA at p. 1169-1172).

Deputy Smith frisked and handcuffed Mr. Unger and asked that Deputy Chason transfer Mr. Unger in his patrol car to the Anderson County Jail because Deputy Smith had a K-9 unit which carried a police dog. (ROA at p. 1169-1172).

Mr. Unger was taken to be booked at 11:23 a.m. at the Anderson County Jail on charges of operating a vehicle without liability insurance, operating a vehicle without a valid driver's license, and operating a motor vehicle with defective equipment. (ROA at p. 153).

Unger was held overnight and provided bedding in accordance with Texas Commission on Jail Standards in the Anderson County Jail until arraignments were held the following day. (ROA at p. 447; RE at p. 60). The arraignments for October 28, 2005 had occurred at the jail prior to Mr. Unger's arrival. (ROA at p. 450).

Mr. Unger was taken before Justice of the Peace Carl Davis for arraignment at 1:47 p.m. on October 29, 2005. (ROA at 475). All three charges against Mr. Unger were Class "C" misdemeanors. (ROA at 475). Justice of the Peace Davis asked Mr. Unger to enter a plea. (ROA at 475). Mr. Unger refused to enter a plea and refused to sign the Magistrate and Warning and Finding Regarding Probable Cause. (ROA at 475). Bail was set at $1,500.00 and Mr. Unger was allowed to make a phone call following the arraignment. (ROA at p. 456 & 475-476).

Mr. Unger was released on October 29, 2005 when the $1,500.00 bail was posted.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried the burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. Petitioner's Assertion of Sovereign Immunity is Not Relevant, Misguided and Not Compelling

A. Sovereign Immunity Bears no Relevance to the Causes of Action Brought Against the Respondents

Unger contends that his timely assertion of sovereign immunity (prior to his arrest) resulted in an unconstitutional arrest, detention and incarceration.

These assertions are clearly absurd and irrelevant to the well settled laws and standards established by this Court.

As Unger's claim of immunity hinges upon his arrest, a careful examination of the well established standards of fourth amendment rights concerning the seizure of the person is essential. An arrest is considered unlawful unless it is made pursuant to a warrant or is supported by probable cause. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004). Under Fifth Circuit precedent, "probable cause exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Id.* Although reasonable suspicion is insufficient to justify an arrest, additional facts that develop after a stop may create the probable cause necessary to effectuate an arrest. *United States v. Costner*, 646 F.2d 234 (5th Cir. 1981). The constitutional validity of an arrest turns upon whether the officer had probable cause to make the arrest. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

The issue then becomes whether such a seizure (arrest) was reasonable under the Fourth Amendment as "the essential purpose of the proscription in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials in order to 'safeguard the privacy and security of individuals against arbitrary invasion'" *Delaware v. Prouse*, 440 U.S. 648, 653-54, (1979). The

permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of a legitimate governmental interest. *Id.* at 654.

The reasonableness inquiry under the Fourth Amendment is an objective one. *Ohio v. Robinette*, 519 U.S. 33(1996); *Whren v. United States*, 517 U.S. 806 (1996); *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987). "So long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry." *Id.* at 1184. The warrantless arrest of a person is a species of seizure required by the Fourth Amendment to be reasonable. *New York v. Payton*, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

In this case, the constitutionality of the arrest cannot seriously be questioned by the pre-emptive assertion of sovereign immunity by the suspect, Daniel Unger. It remains undisputed that Unger confessed, prior to his arrest, that he did not have a driver's license or liability insurance. (ROA at p. 1169-1172). Each of these offenses constitutes an independent traffic violation of the Texas Transportation Code. TEX. TRANSP. CODE §§ 547.605, 521.021, & 601.051. Texas law provides that any peace officer is authorized to arrest without a warrant any person found committing a traffic violation. *Nite v. State*, 882 S.W.2d 587, 1994 Tex. App. LEXIS 2102 (Tex. App. Houston 1st Dist. 1994); (Tex. Transp. Code Ann. § 543.001); *Tores v. State*, 518 S.W.2d 378 (Tex. Crim. App. 1975); *Irving v. State*, 2002 Tex. App. LEXIS 4404 (Tex. App. Corpus Christi June 20, 2002).

Notwithstanding the absurdity or veracity of Unger's belief that he is immune from the laws of the State of Texas, Unger has failed to present or reference any federal or state statute or case law demonstrating the relevance of a suspect's entitlement to immunity when considering the validity of an arrest. It is clear that Unger's assertion of sovereign immunity is irrelevant to the objective reasonableness standard established by this Court. While immunity may serve as a viable defense, a preemptive assertion of immunity has no relevance to the lawfulness of an arrest or to a consideration of whether a person's civil liberties have been violated. Therefore, even assuming that Unger was entitled to a defense of sovereign immunity, such a holding should not render the arrest and detention a violation of Unger's civil liberties when there was probable cause for the arrest and the officer acted reasonably.

B. Petitioner's Claim of Sovereign Immunity Under 28 U.S.C. §§ 1602-1611 Is Misguided

Unger references the Foreign Sovereign Immunities Act as codified in 28 U.S.C. § 1330 and §§ 1602-1611 as authority for his assertion of immunity and as the foundation of his civil rights claim against Respondents. However, Unger is not entitled to immunity under any such Act.

Section 1602 provides that "[t]he congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and

would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. Petitioner has failed to establish his entitlement to immunity under the Act and provides no valid explanation as to why he should be personally classified as a "foreign state" or an "agency or instrumentality of a foreign state" as defined under § 1603 of the Act.

§1603 of the Act provides, in pertinent part, as follows:

"For purposes of this chapter [28 USCS §§1602 et seq.]—

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> > (1) Which is a separate legal person, corporate or otherwise, and
> >
> > (2) Which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

> (3) Which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title nor created under the laws of any third country."

28 USC §1603.

Unger has failed to demonstrate why he should be personally considered a "foreign state" or an "agency or instrumentality of a foreign state." Instead, Petitioner contends that he is a member of the posterity of the "Sovereign American People" by way of a distant relative, John W. Unger, who served as a border ranger and ensign in the American Revolutionary War, and who had taken the Oath of Allegiance to the Commonwealth of Pennsylvania in 1776. Without addressing the validity of Unger's lineage with John W. Unger, Unger has failed to demonstrate the current existence of the Commonwealth of Pennsylvania and how any relation to the Commonwealth of Pennsylvania entitles him, an individual person, to immunity.

In any event, it is clear that the Foreign Sovereign Immunities Act was not intended to provide protections to an American born individual such as Unger. Instead, the Act was intended to establish limitations as to whether a foreign sovereign nation (or its political subdivisions, agencies or instrumentalities) may be sued in a U.S. court—federal or state. Clearly, Unger's sense of entitlement to sovereign immunity from federal and state laws of this nation is misguided. Moreover, Unger has failed to demonstrate any compelling reasons to hear this case.

II. Petitioner's Right to Travel Claim was Appropriately Dismissed as a Matter of Law by the District Court

For the first time, Unger now contends that by birthright, as a member of the sovereign American People (whoever they may be), he should not be required to have a driver's license and proof of insurance, for reason that any such requirement infringes upon his Constitutional right to travel as provided under *Williams v. Fears*, 179 U.S. 270 (1900). Unger's arguments must be rejected on several accounts.

To begin, the constitutionality of Texas state laws requiring Texas driver's to possess a drivers license and financial responsibility (insurance) was not brought into issue via Unger's Original Complaint or via his Petition to the Fifth Circuit Court of Appeals. As such, this Court should not indulge Unger's unmeritorious arguments as they have been made untimely.

Second, the decision of the Fifth Circuit affirming the District Court's dismissal of Unger's right to travel claim is not in conflict with the *Fears* decision as asserted by the Petitioner. The issue before the Court in *Fears* was "whether a state law taxing occupations is invalid so far as applicable to the pursuit of the business of hiring persons to labor outside the state limits because in conflict with the Federal Constitution." *Fears*, 179 U.S. at 274. In dicta the Court references the right of locomotion and the right to move from one place to another as rights secured by the Fourteenth Amendment and by other provisions of the constitution.

Id. at 274. However, the *Fears* Court does not consider whether a state law requiring proper licensing and insurance of drivers is a violation of the 14th Amendment right to exercise free travel. Instead, the *Jones v. Helms*, 452 U.S. 412 (1981) decision, provides a clear framework for a right to travel analysis.

It is well settled that the right to travel is protected by the Constitution, and that the right prevents a state from taxing or penalizing a citizen for exercising the right to leave one state and enter another. *Jones v. Helms*, 452 U.S. 412, 418 (1981). Despite the fundamental nature of the right, a state may prevent a citizen from leaving under certain circumstances, including when probable cause justified an arrest and subsequent detention. *Id.* at 419.

In his complaint, Unger's arguments regarding his right to travel appear to focus more on the alleged violations of his Fourth Amendment rights (ROA, pp 26-43). However, to the extent he intended to assert a violation of his right to travel instead of the seeming allegations of the Fourth Amendment, his right to travel claim is without merit. It is clear, as described above, that the arrest and detention were supported by probable cause on individual independent grounds for at least two traffic violations. Unger does not dispute that he was driving on a Texas public roadway without a driver's license and without liability insurance. Thus, the detention was appropriate because probable cause justified the arrest. Therefore, as a matter of law, Respondents did not violate his right to travel.

Finally, there are, without question, numerous compelling state interests in requiring proper licensing and insurance for Texas motorists who drive on public roadways. Requiring operators of motor vehicles to be properly qualified to drive, via a driver's license, provides safety to the public at large. Likewise, requiring operators of motor vehicles to possess financial responsibility in the form of insurance also provides necessary protections and safeguards to the public at large. Moreover, the restriction of travel by use of such requirements or laws is narrowly tailored to achieve general safety concerns and protections to the general public without entirely prohibiting free travel on public roadways. Any contrary ruling by this Court would cause massive disruption to the general public and the laws of virtually every state in the United States of America.

Therefore, Unger has failed to demonstrate any compelling reasons for this Court to hear this issue nor has he presented any conflicting decisions of this Court or a Court of Appeals.

III. Petitioner's Arguments Ignore the Qualified and Judicial Immunity Framework

Unger's analysis entirely ignores the judicial immunity and qualified immunity defenses asserted by the Respondents. Unger's arguments concerning violations of certain civil rights, must be analyzed in light of the well settled qualified immunity framework.

A. Qualified Immunity

This Court has long held that qualified immunity shields public officials from suit and liability under § 1983, "unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Babb v. Dorman*, 33 F.3d 472 (5th Cir. 1994); *Gibson v. P.A. Rich*, 44 F.3d 274, 277 (5th Cir. 1995). The affirmative defense of qualified immunity is an "immunity from suit, not simply immunity from liability." *Babb*, 33 F.3d at 477. Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Malloy v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986).

In the context of an arrest, the central question in a qualified immunity inquiry is "the objective (albeit fact-specific) question of whether a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." A*nderson v. Creighton*, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).

Therefore, to defeat qualified immunity, a plaintiff cannot merely allege that the right not to be arrested without probable cause was clearly established. Instead, **a plaintiff must show that the legality of his conduct was clearly established.** In *Sorenson v. Ferrie*, 134 F.3d 325, (5th Cir. 1998) the plaintiff was arrested for possession of a weapon that she kept in the trunk of her car. In granting qualified immunity, the Court held that the plaintiff must demonstrate that, at the time of her arrest, it was clearly established in Texas that one

may lawfully possess a handgun in one's trunk. The Court discussed the relevant statute and case law and found that it was not clearly established that carrying a handgun in the trunk of a car was a violation of the Texas Penal Code Ann. §46.02(a)(unlawfully carrying a weapon), therefore, a reasonable officer could have believed the arrest to be lawful.

In *Saucier v. Katz*, 533 U.S. 194 (2001) the United States Supreme Court instructed that the inquiries for constitutional violations and qualified immunity remain distinct. *Saucier*, 533 U.S. at 204. The Court opined that "it is sometimes difficult for an officer to determine how the relevant legal doctrine...will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Id.* at 205. In that case, the Supreme Court stated that qualified immunity operates as a shield to protect officers if, in fact, a constitutional violation has been committed, but the officer's mistaken belief was reasonable in light of established law. *Id.* at 205-06. The defendant's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the dendant's conduct violated the plaintiff's constitutional right. *Anderson*, 483 U.S. at 641.

Unger asserts that his civil rights were violated based upon an alleged membership of the "Sovereign American People" who are allegedly immune from the jurisdiction of the courts of the United States and

immune from Texas laws requiring that a person have a driver's license and financial responsibility in order to travel on public roadways.

Unger's assertions of immunity and a violation of his civil rights based upon that immunity are outrageous. The legality of his conduct (or his immunity from the laws of the State of Texas) is in no way "clearly established." As such, his arrest was objectively reasonable based upon the information of the arresting officer, Respondent John Smith. Accordingly, the District Court's qualified immunity ruling in favor of the Respondents concerning the arrest and incarceration of Unger was consistent with well established principles of law.

B. Judicial Immunity

Unger also alleges claims against Justice of the Peace Davis for his role in the events at issue. Respondent Davis has asserted judicial immunity as an absolute defense from the Petitioner's claim.

It is well-settled that judicial officers are entitled to absolute immunity from claims for damages arising out of acts performed in the exercise of their judicial discretion. *Boyd v. Biggers*, 31 F3d 279, 284 (5th Cir. 1994). A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by commission of "grave procedural errors." *Stump v. Sparkman*, 435 U.S. 349, 359 (1978). A judge cannot be deprived of immunity simply because the action or inaction taken was in error, done maliciously, or in excess

of judicial authority. *Id.* Judicial immunity is immunity from suit an not just from the ultimate assessment of damages. *Mireless v. Waco*, 502 U.S. 9, 11 (1991). Plaintiff's cannot overcome judicial immunity through allegations of bad faith or malice, and the immunity applies even when the Judge is accused of acting maliciously or corruptly. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

Judicial immunity protects a judge against liability for all but non-judicial acts, and judges are subject to liability only when they act in clear absence of all jurisdiction. *Ballard v. Wall*, 413 F.3d 510, 515 (5th Cir. 2005). In determining whether a particular act is "judicial," the court considers four factors: (1) whether it is a function normally performed by the judge, (2) whether the acts occurred in the courtroom or adjunct space such as the judge's chambers, (3) whether the controversy centered around a case pending before the court, and (4) whether the parties dealt with the judge in his official judicial capacity. *Malina v. Gonzalez*, 994 F.2d 1121, 1124 (5th Cir. 1993). In weighing these factors, courts use a functional approach in deciding whether an act is judicial for purposes of immunity, meaning the focus of the immunity analysis is on the nature of responsibilities of the individual official, not that official's rank or title. *Cleavinger v. Saxner*, 474 U.S. 193, 201-03 (1985). Most importantly for the present analysis, judicial immunity extends to Justices of the Peace. *Ammons v. Baldwin*, 705 F.2d 1445, 1447 (5th Cir. 1983).

Unger's claims against Justice of the Peace Carl Davis are unclear at best. Moreover, all of Unger's allegations are rooted in Justice Davis's actions as Justice of the Peace as performed in his official capacity during Petitioner's hearing on October 29, 2005. Justice Davis did not overstep the bounds of a Justice of the Peace's proper role, and his dealings with Unger were strictly in his official capacity. Accordingly, well established principals of law provide that Justice Davis is entitled to judicial immunity.

As previously stated herein, Unger's application for writ of certiorari seeks to distract the Court's attention from the material issues of the case, of which was either determined by a jury in favor of the Respondents or determined by the District Court in favor of Respondents. Unger's assertion of immunity from the laws of the State of Texas has no bearing on the success of Respondent's immunity defenses. Moreover, Unger failed to present any evidence to indicate that the actions of Justice of the Peace Carl Davis were beyond the realm of his judicial capacity. In addition, Unger has utterly failed to demonstrate how the decision of the trial court and the affirmation by the Fifth Circuit Court of Appeals was in conflict with any decisions of this Court or another Court of Appeals. As such, Petitioner's requests should be denied.

IV. Petitioner Improperly Assumes that the Filing of an Unsworn Declaration Alleging Bias and Prejudice Requires Recusal as a Matter of Law

Lastly, Unger contests the district court judge's refusal to recuse himself after Petitioner filed an affidavit alleging bias and moving for the judge's recusal under 28 U.S.C. § 144 and § 455. Section 144 relates to charges of "actual bias." *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1296 (5th Cir. 1990). To proceed under § 144, the movant must present an affidavit that meets the following requirements: "(1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature." *Id.* Under § 455, a judge must recuse himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The standard is "whether a reasonable person, with full knowledge of all of the circumstances, would harbor doubts about the judge's impartiality." *Matassarin v. Lynch*, 174 F.3d 549, 571 (5th Cir. 1999).

Unger's affidavit essentially alleges that the district court judge was biased because of his unfavorable rulings on numerous nonmeritorious motions, objections, and complaints. Because the alleged bias is "judicial," rather than "personal" in nature, the facts alleged do not meet the requirements for a § 144 affidavit. *See Davis v. Bd. of Sch. Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975) (explaining that the alleged bias was not extra-judicial, but "very

much judicial," since the movants were complaining of language in an order and an opinion). Neither do the allegations show that a reasonable person would doubt the district court judge's impartiality. As such, the district court did not abuse its discretion in denying Petitioner's motion.

Unger's "Argument for Allowance of Writ" provides no explanation of how the Fifth Circuit's Opinion affirming the District Court's denial of Petitioner's motion for recusal of the district judge was is in conflict with a decision of this Court or a Court of Appeals, and has further failed to claim that the Fifth Circuit's ruling implicates an important federal question that has not been settled by this Court. Therefore, Unger's writ should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petitioner be denied.

Respectfully submitted,

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No. 10-128

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

Daniel Ray Unger,

Petitioner

v.

Greg Taylor; John Smith; Bryan Chason; Zak Montoya; Carl Davis; Anderson County, Texas;

Respondents

On Petition For Writ Of Certiorari
To the United States Court Of Appeals
For The Fifth Circuit

PETIONER'S REPLY BRIEF

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> *The Stile of this Confederacy shall be "The United States of America."*

28 U.S.C. § 1332(e):

> *(e) The word "States" as used in this section includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.*

28 U.S.C. § 1603:

> *For purposes of this Chapter-*
> *(a) A "foreign state", ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).*
> *(b) An "agency or instrumentality of a foreign state" means any entity-*
> *(1) which is a separate legal person, corporate or otherwise, and*

(2) which is an organ of a foreign state or political subdivision thereof,... and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

RESPONDENTS MISSTATEMENT OF THE FACTS

1. Respondents' allegation that "*Petitioner has ...failed to provide any evidence of his affiliation with the 'Sovereign American People*" [Brief in Opposition page no 1].

Respondents are being disingenuous with this Court. Petitioner provided a verified affidavit[1] [made subject to the pains and

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[1] Petitioner unintentionally misstated his lineage in his original Petition for Writ of Certiorari. It was actually John Nichols (or Nicholas) [Born in 1759] who served as an ensign and border ranger in the American Colonial Army during the American Revolution, as reflected in Petitioner's affidavit. John Nichols also was my ancestor who took the Oathe of Allegiance to the Commonwealth of Pennsylvania in 1776. John W. Unger, who I attributed the above facts to in said Petition, was actually the son of John Nichols and his wife

penalties of perjury] of his lineage which is reflected in the Record on Appeal ["ROA"]. See Plaintiff's Motion for Summary Judgment, Exhibit 6, ROA pps. 1072-1079. Contrary to Respondents' allegations, Petitioner did present evidence to the trial that he is the posterity [and therefore a member] of the Sovereign American People.

2. Respondents' allegation that "*Unger denies that he is a citizen of the United States of America...*'. [Brief in Opposition page no 3].
Respondents are being disingenuous with this Court. Petitioner has not denied that he is a "Citizen[2] of The United States of America", but rather Petitioner has pled that he is a Citizen of the Confederacy, which is known as "The United States of America", see Articles of Confederation Article I. Petitioner has denied being a federal 'citizen' of the United States, which

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Catherine Hullinger, and John W. Unger was born in 1790. These facts are referenced in the aforementioned affidavit.

[2] Petitioner believes that it would be more proper to capitalize 'Citizen' when used in this manner; although he has no intention in engaging in a semantic argument.

is a citizen of the District, or its Territories, or the Commonwealth of Puerto Rico, see also 28 U.S.C. § 1332(e).

3. Respondents' allegation that "*For the first time, Unger now contends that by birthright, as a member of the sovereign American People (whoever they may be)...infringes upon his Constitutional right to travel ...*" [Brief in Opposition page no 13].

Respondents' are being disingenuous with this Court. Respondents' Brief in Opposition actually shows that Petitioner alleged violations of '*his right to travel and right to liberty*' [emphasis added]; and then Respondents reference Petitioner's complaint in the ROA where Petitioner complained of this issue [See Brief in Opposition page no 4, 1st par.]. This issue was also extensively covered in Petitioner's Motion for Summary Judgment in the trial court [ROA ppgs. 1001-1002]. This issue should have been decided as a matter of law; however, the appellate court refused to address this issue presented in Petitioner's Motion for Summary Judgment because of the subsequent trial [See Petitioner's

Appendix to Petition for Writ of Certiorari, Vol. I, appendix B, page 9 of 28].

REPLY TO RESPONDENTS' REASONS FOR DENYING THE PETITION

I. Respondents first argue that Petitioner's assertion of Sovereign Immunity is misguided and not compelling [Brief in Opposition pages 7-12].

First: Petitioner has made an unchallenged claim to Sovereign Immunity. The Respondent tortfeasors totally disregarded Petitioner's claim at the local level, and, in fact, punished Petitioner as a direct result of said claim. Petitioner's claim again went unchallenged in the trial court, and again the Court disregarded Unger's claim and failed to address the issue of Sovereign Immunity. Finally, the appellate court failed to address Petitioner's claim to Sovereign Immunity, although recognizing that Petitioner had made the claim.

Second: Respondents imply that Petitioner has failed to demonstrate how his relation to the Commonwealth of Pennsylvania entitles Petitioner to

immunity. Again, Respondents are being disingenuous with this Court. In the trial court Petitioner refers to the following Supreme Court cases in support of his position [See Petitioner's Motion for Summary Judgment, Exhibit 6, ROA ppgs. 1076-1077]:

Scott v. Sanford 60 U.S. 699 at 701 [emphasis added]:

> *It is true every person and every class and description of persons, who were at the time of adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body;* ***but none other****; it was formed by them, and for them and* ***their posterity****,* ***but for no one else****. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace* ***those only who were then members of the several state communities****, . . .*

Cohens v. Virginia 5 Led (1821), Wheat 6, 257 at 347 and at 381 [emphasis added]:

at 347

> *The people of the United States are the* ***sole sovereign authority*** *of this country.* ***By them, and for them****, the constitution was established.*

at 381

> *To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given 'in order to form a more perfect union, establish justice, and ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to* ***themselves and their posterity****.'*

Third: Respondents allege that Petitioner has failed to demonstrate why Petitioner should be considered within the purview of 28 U.S.C. §§ 1602 et seq. Respondents have now, for the first time, challenged Petitioner's claim to Sovereign Immunity. 28 U.S.C. § 1603 (b) [parts (1) thru (3)] lists three criteria one must meet for consideration as a foreign state.

Part (b) states, that a 'foreign state' means any 'entity'. **Black's Law Dictionary** 4th ed. Page 626 defines 'entity' as "*A real being; existence.*" Petitioner is an entity.

Part (1) then states that Petitioner must be '*a separate legal person, corporate or otherwise,*'. **Black's Law Dictionary** 4th ed. Page 1299 defines 'person' as "*A man considered according to the rank he holds in society, with all the right to which the place he holds entitles him, and the duties which it imposes. ...*" Petitioner is most certainly a separate legal person.

Part (2) states in pertinent part '*Which is an organ of a foreign state*". **Constitutional Limitations**, Cooley, 1868, p. 31 states in pertinent part [emphasis added]:

> *The people, in the legal sense, must be understood to be those who, by the existing constitution, ...will be the* ***sole organs*** *through which the will of the body politic can be expressed.*

Petitioner has shown himself to be one of the 'people'; and therefore, one organ.

The several States of the Confederation are considered 'foreign' to each other except as regards to their relations as a common member of the Union. **Black's Law Dictionary** 4th ed., page 1578 under the term "State" and sub heading "Foreign State" and **Phillips v. Payne, 92 U.S. 130** at 132. Petitioner has now shown that he is an '*organ of a foreign state*'.

Part (3) states that in order for Petitioner to be a foreign state, he cannot be created under the laws of any third country, nor be a citizen of a State of the United States as defined in section 28 U.S.C. §1332 (e). Petitioner inherited his citizenship [by birth right] [See **Scott v. Sanford 60 U.S. 699** at 701 above] when his ancestors created the Declaration of Independence, the original Constitution of the Commonwealth of Pennsylvania, and the Articles of Confederation; therefore, Petitioner's citizenship was not created under the laws of any third country. Petitioner is not a citizen of the Territories, the District of Columbia, or the Commonwealth of Puerto Rico as defined by 28 U.S.C. §1332 (e).

Petitioner has made a *prima facie* showing that he is a foreign state as defined in 28 U.S.C. § 1603 (b).

II. Respondents' allegation concerning Petitioner's right to travel [Brief in Opposition pages 13-15] is off point [concerning whether Petitioner is required to have a license and be insured in order to exercise his right to liberty]; and Petitioner's Petition for Writ of Certiorari adequately supports his position.

III: Respondents' argument in their Brief in Opposition, part III, ppgs 15 thru 20 does not directly address Petitioners' "*Argument for allowing writ*" [See Petition for Writ of Certiorari page 14]. Respondents are again being disingenuous with this Court. Respondents then launch a diatribe of argument which fails to accurately reflect specific facts and law at issue which would be controlling for the failure of the appellate court to review Petitioner's motion for summary judgment which should have been granted as a matter of law. Had the appellate court reviewed Petition's motion for summary judgment, the Court would have been compelled to grant Petitioner's

motion as a matter of law against all Respondents.

IV. Respondents' argument in their Brief in Opposition, part IV, ppgs 21 thru 22, again is disingenuous, alleging that Petitioner's declaration of bias and prejudice was based upon unfavorable rulings and not upon personal bias. In reference to the above misstatement, Petitioner presents his declaration of bias and prejudice in Appendix C. Contrary to Respondents' disingenuous allegations, Petitioner's affidavit alleges personal bias and prejudice because for the sole reason that Petitioner was appearing '*in propria persona*' or as a '*pro se*' litigant.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that petition for a writ of certiorari should be granted.

Dated: 9/04/2010

Respectfully submitted,

Daniel R. Unger

Daniel Ray Unger

APPENDIX TABLE OF CONTENT:

Appendix C :

Unsworn Declarations Under Penaltyof Perjury (see 28 U.S.C. 1746)Of Bias or Prejudice (28 U.S.C. §§ 144, 455(a)) 1-18

In The United States District Court
For the Eastern District of Texas
Tyler Division

Daniel Ray Unger)
Vs.) Civil Action No.
6:06cv466
Greg Taylor, et al.)

Unsworn Declarations Under Penalty of Perjury (see 28 U.S.C. 1746)
Of Bias or Prejudice (28 U.S.C. §§ 144, 455(a))

I, Daniel Unger, under penalty of perjury under the laws of the United States of America, declare and state:

1. My name is Daniel Ray Unger. I am over 18 years of age. My current mailing address is Care of General Delivery, United States Post Office, Grapeland, Texas 75844. My domicile is the Commonwealth of Pennsylvania, (one of the Original Thirteen Colonies which became a State under the Articles of Confederation) by birth right.
2. I am the Plaintiff in this matter and the above entitled cause. I make

this unsworn declaration under penalty of perjury to disqualify the Honorable Michael Schneider from this case on the basis of his personal bias or prejudice against me.

3. I am bringing this cause on my own behalf, *in propria persona*, or in the more commonly applied legal term, *pro se*; although, the Magistrate Judge recently assigned an attorney for mediation and *voir dire* purposes only, and the presiding Judge expanded the attorney authority to serve as "stand by" counsel at my discretion.

4. I have not consented to have this action tried by a United States magistrate.

First Circumstance of Bias or Prejudice:

5. On the morning of May 12, 2008, I attempted to file Plaintiff's Response to Defendants' Objections to Plaintiff's Stenographic Deposition Designation (Docket entry no. 178). My motion [excluding the certificate of service] was only 11 pages, and in compliance with Local Civil Rules ("LCV") LCV-7(a)(2) 15 page limitation [excluding attachments]. However, the Court Clerk [named Mike] refused to allow me

to file my motion because my motion with attachments exceeded the purported 20 page limitation imposed by LCV-3(b). The Defendants motion (Docket entry no. 167), to which I was responding exceeded the 20 page limitation imposed by LCV-3(b), and was filed by Defendants without leave of the Court to exceed the 20 page limitation.

6. After reading this local rule I complained to the Clerk because the rule was apparently only meant to be applied to the "Commencement of Action". The Court Clerk informed me that the presiding Judge had instructed the Clerks to apply LCV-3(b) page limitation to all pro se pleadings. I complained that the rule was a violation of my right to due process and equal protection of the law; and, the Clerk stated that he would specifically check with presiding Judge [which is the Honorable Michael Schneider], who was not available at the time; and, that I could check back later for the Judge's decision.

7. After checking back with the Clerk on the afternoon of May 12, 2008, I was informed that [as per the presiding Judge's instruction] I could

not file my pleading without filing a motion for leave of the court to exceed the 20 page limitation, which I subsequently filed (Docket entry no. 177).

8. The purported local rule is unconstitutionally vague, arbitrary and capricious; and a violation of my right to due process of law and my right to equal protection of the law. The Honorable Judge Michael Schneider applied this local rule against me in a discriminatory manner, merely because I am not an attorney. The rule allows the Court to grant or not to grant leave in an arbitrary, vague and capricious manner; and, the rule sorely limits my remedy, contrary to the lack of limitations imposed on attorneys.

9. The Honorable Judge Michael Schneider has engaged in conduct prejudicial to the effective and expeditious administration of my business with this court in a manner intended to discriminate against me.

Second Circumstance of Bias or Prejudice:

10. Federal Rules of Civil Procedure Rule ("FRCP") 45(a)(3), in relevant part states:

"The clerk **shall** issue a subpoena, signed but otherwise in blank, to a **party** requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of ..." (emphasis added)

11. This Court's Local Rule LCV-45 provides that "*Attorneys shall prepare all subpoenas.*" Based upon LCV-45, this Court's Clerks have denied me my due process right to have the clerk issue signed, but otherwise blank, subpoenas for witnesses to appear on my behalf.

12. On May 13, 2008, the Magistrate ordered that I could have subpoenas issued for my trial witnesses (Docket entry no. 182), thereby allowing the Court Clerks to issue subpoenas on my behalf as provided by FRCP Rule 45 (a)(3)

13. On May 15, 2008, Defendants filed a Motion for reconsideration (Docket entry no. 185), which the Honorable Judge Michael Schneider granted in part and denied in part (Docket entry

no. 192) limiting the witnesses I could subpoena to my wife (Tracie) and former Anderson County jailor, Terry Hamilton. The Honorable Judge Michael Schneider states that he "*finds that Plaintiff has not shown good cause for the issuance of subpoenas to individuals not identified to Defendants within the discovery period or the deadline set by the Magistrate Court's November 27, 2007, Order (Doc. No. 111).*" (Docket entry no. 192, 2nd paragraph., 1st sentence). The Honorable Judge Michael Schneider made no finding that the Magistrate's order is clearly erroneous or contrary to the law before he modified it.

14. The Honorable Judge Michael Schneider violated my right to due process of law when he modified the Magistrate's pretrial order which was not first determined to be not clearly erroneous as required by 28 U.S.C. § 636 (b) (1) (A) and FRCP Rule 72(a) (regarding non-dispositive matters), which provides that the District Judge can only modify or set aside those portions of the magistrate's order which it finds to be "*clearly erroneous or contrary to law.*"

15. The Honorable Judge Michael Schneider violated my right to due process and equal protection of the law when he imposed LCV-45 contrary to the dictates of FRCP Rule 45 (a)(3), which provides that the Clerks shall issue subpoenas signed, but otherwise blank, to a party requesting it; thereby discriminating against me because I am a pro se litigant.

16. The Honorable Judge Michael Schneider engaged in conduct prejudicial to the effective and expeditious administration of my business with this court when he modified the aforesaid Magistrate's order and denied me the right to have the Court Clerks issue subpoenas for trial witnesses on my behalf.

Third Circumstance of Bias or Prejudice:

17. At the status conference held on April 8, 2008, Defendants' attorney Victor Haley asked the Magistrate Judge if the trial was set for June 2, 2008. The Magistrate stated that Judge Schneider has set June 2 as the pretrial conference; and that, at the conference, Judge Schneider would announce when

jury selection and the date of the trial would be.

18. I specifically asked the Magistrate how long after the pretrial conference that the trial would be held, and the Magistrate stated that I would need to call Judge Schneider and ask him.

19. After the status hearing, I called Judge Schneider and was told by his Clerk that, for pro se litigants' cases, the Judge would have a Docket call; but, that I would need to talk to the Magistrate's law clerk concerning that issue.

20. After speaking with one of Judge Schneider's clerks, I called the Magistrate's law clerk whose name is "Bryan". After explaining the situation to Bryan, he told me that he would find out the trial date from Judge Schneider, and he would either call me, or I could call him.

21. Either later that day (April 8, 2008), or the next day, Bryan told me that Judge Schneider held an "oldtime" docket call, and would set the trial date on June 2, 2008. Bryan also said that the most likely dates for the trial would either be to begin on June 2, 2008, or June 9, 2008. I complained to Bryan

because I would not know when to have my witnesses appear for trial.

22. On April 11, 2008, the Magistrate appointed David Iglesias as counsel for mediation and voir dire only (Docket entry no. 153); and, on April 23, 2008, Judge Schneider expanded Iglesias' authority by appointing him as "stand by" counsel (Docket entry no. 164).

23. I spoke with David Iglesias concerning the trial dates; and, after he checked with the Court, he told me that in my case the judge would do a traditional docket call and set the trial dates on June 2, 2008 at the pretrial conference. The trial dates and voir dire dates were set at the pretrial conference held on June 2, 2008.

24. LCV-83(a) states "*Docket Calls. Traditional docket calls are abolished. Each judge shall endeavor to set early and firm trial dates which will eliminate the need for multiple-case docket calls.*"

25. The Honorable Judge Michael Schneider violated my right to due process and equal protection of the law when he failed to set early and firm trial dates as required by LCV-83(a), thereby discriminating against me because I am a pro se litigant. The Honorable Judge Michael Schneider has engaged in

conduct prejudicial to the effective and expeditious administration of my business with this court when he failed to set an early and firm trial date as required by LCV-83(a).

Fourth Circumstance of Bias or Prejudice:

26. I filed objections to Defendants pretrial disclosures claiming that Defendants certification on their certification of pretrial disclosures was falsely made (Docket entry no. 174, page 7, item no. "VI") because Defendants had failed to provide the required disclosures.

27. At the status conference held on June 2, 2008, Wade Flasowski, one of the attorneys for the Defendants, lied to the Court stating that the first time that I had made any mention of disclosure of potential witnesses [Gary Livingston and Richard Welch] to appear on my behalf was on my notice of trial witnesses which I filed on December 14, 2007 (Docket entry no. 115).

28. In rebuttal to Defendants' allegation above, I brought to the Court's attention that I had requested

the disclosure of Gary Livingston and Richard Welch on April 5, 2007, in my request for additional disclosure (Docket entry 27, page 1, item no. 2); and, that Defendants had specifically objected to providing his contact information on May 4, 2007, (Docket entry no. 38). However, instead of admonishing Defendants for lying to to the Court, the Honorable Judge Michael Schneider grilled me on whether or not a hearing had been held to determine if Gary Livingston the issue [presumably if the Livingston disclosure], and Judge Schneider showed no concern that Defendants had intentionally lied to the Court about the alleged disclosure.

29. This conduct by the Honorable Judge Michael Schneider has shown a personal bias or prejudice against me in presenting my objections to the Court.

Fifth Circumstance of Bias or Prejudice:

30. On April 22, 2008, the Magistrate issued an order (Docket entry no. 156) denying my motion for leave to amend my complaint, and motion to extend the docket control deadline for filing amended pleadings (Docket entry nos.

146 and 147). The filing deadline for objections to this order was May 9, 2008, pursuant to FRCP Rule 72 and Rule 6.

31. On May 6th, 2008, Chief Judge Thad Heartfield issued general order 08-06, extending all filing deadlines in this court occurring between Friday, May 2, 2008 and Sunday, May 11, 2008, to May 12, 2008, because the court suffered a technical failure on May 2, 2008. On May 7th, 2008, I had contacted the Court Clerk concerning filing my objections, and was instructed by the Clerk that my objections due on May 9, 2008, could not be filed at that time. and were extended until May 12, 2008, pursuant to the above general order 08-06.

32. On May 12, 2008, I timely filed my objections (docket entry no. 176 and 179) to the Magistrate's order (Docket entry no. 156) pursuant to FRCP Rule 72(a). My objections alleged that the Magistrate's report was "*clearly erroneous and contrary to the law*" (Docket entry no. 176, page 2, item no. 3).

33. On May 27, 2008, the Honorable Judge Michael Schneider issued an order disposing of my objections by erroneously

construing my objections to an appeal of the Magistrate Judge's order. This position is without support in the law or the rules as I have never given my consent for the Magistrate to try my case, or consented to appeal to the District Court, any Magistrate's judgment as provided by Rule 4 of appendix B of the local rules.

34. The Honorable Judge Michael Schneider is so biased and prejudiced against me that he failed to construe my FRCP rule 72 objections as a motion for reconsideration as provided for by 28 U.S.C. § 636 (b)(1)(A) and Rule 4 (A) of appendix B of the local rules; as pro se litigants pleadings are to be liberally construed in favor of relief.

35. The Honorable Judge Michael Schneider showed his bias and prejudice when he failed to consider, and set aside, the portion of the Magistrate's order that I showed to be clearly erroneous and contrary to the law.

36. The Honorable Judge Michael Schneider violated my right to due process and equal protection of the law when he failed to consider and set aside the portion of the Magistrate's order that I showed to be clearly erroneous and contrary to the law in my objections.

The Honorable Judge Michael Schneider has engaged in conduct prejudicial to the effective and expeditious administration of my business with this court when he failed to properly rule on my objections.

Sixth Circumstance of Bias or Prejudice:

37. On May 19, 2008, the Honorable Judge Michael Schneider issued an order (Docket entry no. 192) in which he ordered the Clerk's office not to issue a subpoena on Richard Welch, who was the jailor who provided me with bedding, and allowed me to use the phone [for the first time] to make bond, late on the evening of October 29, 2005 (See Complaint, Docket entry no.1, page 10, item no. 59).

38. I had listed Jailor Richard Welch as a person with knowledge on my Complaint (See Complaint, Docket entry no.1, page 10, item no. 59), and as a witness on my trial witness list (Docket entry no. 115, page no. 2, item no. 17).

39. Defendants failed to disclose Deputy Richard Welch's name, address, and telephone number to Unger during discovery, even though I requested this

information in my request for additional disclosures (Docket entry no. 27, page no. 1, item no. 1).

40. The Honorable Judge Michael Schneider showed that he is biased and prejudiced against me when he allowed Defendants to call as their witness Richard Welch, who had not been previously disclosed during discovery; but, at the same time, denied me the right to have a subpoena issued to call Richard Welch as my witness, after I had requested disclosure of his personal information from Defendants that they failed to provide.

Seventh Circumstance of Bias or Prejudice:

41. On June 2, 2008, the Honorable Judge Michael Schneider issued a verbal order which prohibited me from filing any further motions in this cause of action (See minutes of pretrial conference, Docket entry no. 214, at 5:51 pm).

42. I requested that I be allowed to file objections and/or motion for reconsideration of order for which the time period had not expired to respond to said order, but my request was denied.

43. The essence of the Honorable Judge Michael Schneider's order denying me the right to file any further motions in this cause prevents me from filing motions for the Court to take judicial notice, motions for directed verdict, motions for new trial, and motions for judgment on the pleadings; all of which are motions allowed under the rules.

44. The Honorable Judge Michael Schneider has violated my right to due process of the law and right to access the Court for remedy by denying me the right to file motions with the Court. The Honorable Judge Michael Schneider has engaged in conduct prejudicial to the effective and expeditious administration of my business with this Court and shows a bias and prejudice against me.

Unsworn Declarations Under Penalty of Perjury (see 28 U.S.C. 1746)

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

_____

_____

Daniel Ray Unger, Dated
c/o General Delivery

U.S. Post Office
Grapeland, Texas 75844
(903) 948-9708

Certificate of Counsel

As required by the provision of Title 28 Section 144 of the United States Code, I, Daniel Unger, appearing on my own behalf as myself as counsel of record, certify that this Unsworn Declarations Under Penalty of Perjury (see 28 U.S.C. 1746) of prejudice is submitted in good faith and not for purposes of delay.

Dated: _____

Respectfully Submitted,
Daniel Ray Unger, (in propria persona

Certificate of Service

I, Daniel Ray Unger, do hereby certify that a true and correct copy of the above and foregoing document has been served by placing the same in the United States Mail with adequate first class postage addressed as shown below on this the **10th** day of **June**, 2008.

_____
Daniel Ray Unger

C Victor Haley
Fairchild Price Thomas & Haley
PO Drawer 631668

1801 North St.
Nacogdoches, TX 75963-1668